



One Discovery Place
Silver Spring, Maryland 20910

Don_Baer@discovery.com
T: 240.662.5849
F: 240.662.1485

ORIGINAL

Ex Parte

Donald A. Baer
Senior Executive Vice President
Strategy and Development

EX PARTE OR LATE FILED

December 3, 2003

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Ex Parte Presentation in CS Docket No. 98-120

Dear Ms. Dortch

On December 2, 2003, Ms. Judith A. McHale, President and Chief Operating Officer of Discovery Communications, Inc. (DCI), and I met with Commissioner Copps and his senior legal advisor, Jordan Goldstein. We discussed the enclosed presentation, including the harm to program companies such as Discovery and to consumers of giving broadcasters another advantage in the competition for cable carriage through multicast must carry. We also discussed the enclosed filings in CS Docket Nos. 98-120, 00-96, and 00-2.

In accordance with the Commission's Rules, an original and one copy of this letter, including three enclosures, are being filed with your office.

Sincerely,

Donald A. Baer

Enclosures

Cc: Commissioner Michael Copps
Jordan Goldstein, Senior Legal Advisor

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One Discovery Place
Silver Spring, MD 20910
T: 240.662.4747
F: 240.662.1500

Ex Parte

Judith A. McHale
President & Chief Operating Officer

November 26, 2003

Ex Parte

Chairman Michael K. Powell
Commissioner Kathleen Q. Abernathy
Commissioner Jonathan S. Adelstein
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: Ex Parte Communication in CS Docket No. 98-120

Dear Chairman Powell, Commissioner Abernathy and Commissioner Adelstein:

Thank you again for meeting with me last week. I appreciated the opportunity to articulate the concerns of Discovery Communications, Inc. regarding multicast must carry and to discuss the deeply disruptive effects a multicast must carry mandate would have on Discovery's ability to continue to build a business that provides high quality programming to consumers.

NBC's announcement late last week that it is preparing to launch up to five new digital cable channels compels me to write in follow up to our meeting. According to reports, David Zaslav, president of NBC Cable, confirmed that NBC is contemplating a number of such networks, but said those plans hinge on the FCC's mandating multicast must carry.¹

I find NBC's announcement dispiriting, and yet utterly predictable. It illustrates the now actual rather than theoretical implications of multicast must carry. While NBC may well be the first broadcast network publicly to announce its preparations, I have no doubt the other broadcast networks have similar efforts in the works.

As we discussed in our meeting, in 1997 when the U.S. Supreme Court handed down the Turner II decision, 64 percent of the cable industry was vertically integrated and broadcast television networks were not aligned with content producers. Today, the landscape could not be more different. While cable vertical integration has decreased to 20 percent, after GE's acquisition of Vivendi is completed, the four major broadcast networks will all be aligned with content producers, and will control the preponderance of cable programming value.

¹ Li, Kenneth. "Peacock considering five new digital cable channels." USAToday.com. 22 Nov. 2003. <<http://usatoday.com>>.

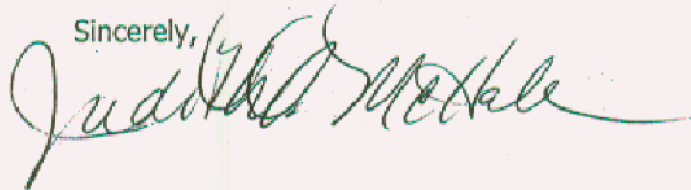
Chairman Michael K. Powell
Commissioner Kathleen Q. Abernathy
Commissioner Jonathan S. Adelstein
Page 2
November 26, 2003

This shift in the landscape, coupled with the retransmission consent rules, already gives broadcasters enormous leverage when it comes to getting carriage of and exorbitant payment for their affiliated cable networks. If the FCC mandates multicast must carry, it will compound that leverage dramatically. Consumer preferences will be cast aside as quality independent programming is replaced with broadcast offerings forced on the public by government mandate. How can that possibly be in the best interest of the American consumer?

When we met, each of you said it was important that broadcasters, if granted multicast must carry, provide more local programming. You may recall my skepticism that the broadcasters voluntarily would provide any more than a de minimis amount of local programming. This recent press report confirms that my skepticism was not unfounded. Among the new digital cable channels that NBC is contemplating are a crime channel and a movie channel. Neither, needless to say, advances the goal of localism.

Again, I appreciate the opportunity to discuss Discovery's concerns with you and urge you to affirm the FCC's 2001 initial must carry decisions.

Sincerely,

A handwritten signature in dark ink, appearing to read "Jonathan S. Adelstein", written in a cursive style.

cc: Jonathan Cody
Stacy Robinson Fuller
Johanna Mikes Shelton



Discovery Communications, Inc.

**Must Carry Presentation
Fall 2003**





Discovery
COMMUNICATIONS

Discovery
CHANNEL

TLC

Animal Planet

Discovery Health
CHANNEL

Travel
CHANNEL

NETWORKS OF DISCOVERY COMMUNICATIONS, INC.

Discovery Times
CHANNEL

Discovery Home & Leisure
CHANNEL

Discovery Kids

THE SCIENCE
CHANNEL

Discovery WINGS
CHANNEL

Discovery
EN ESPAÑOL

Discovery HD
THEATER
YOUR WINDOW ON THE WORLD

Discovery
ON DEMAND
SVOD™

CHOICE 10
Discovery
FREE ON DEMAND
VIDEOS™



Multicast Must Carry Will Destroy Discovery's Investment in its Digital Services

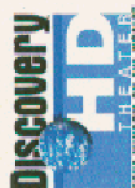
Discovery
COMMUNICATIONS

Discovery is a pioneer of the digital era, having already invested more than \$450 million in digital channels.

- In 1996, without any government assurances of success, Discovery began launching digital networks targeted to particular audiences.



- In 2002, Discovery heeded Chairman Powell's call for high-definition programming, creating the first 24-hour, seven-day-a-week high-definition channel.





Multicast Must Carry Will Destroy Discovery's Incentive to Build its Digital Services

Discovery
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- If broadcasters launch channels that compete with Discovery's digital networks and operators must carry the broadcast channels, regardless of quality, Discovery's digital networks face a substantial risk of being dropped.
- Consumers potentially will lose highly valued programming services, which will be replaced with marginal broadcast offerings.



Broadcasters are Entitled Only to the Amount of Spectrum Necessary to Transmit in High Definition

Discovery

COMMUNICATIONS



- Broadcasters were given 6 MHz of spectrum in 1996 because, at the time, 6 MHz were necessary to transmit in high definition.
- Today, a high-definition transmission requires less than 3 MHz.
- Given the original intent and purpose of the 1996 legislation is met with a continued grant of less than half the original allocation, allowing each broadcaster access to the full 6 MHz is fundamentally unfair and against the clear interests of consumers.



Multicast Must Carry is Bad Public Policy

Discovery
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Multicast must carry will not promote high-definition television.

- Under multicast must carry, the 1996, \$70 billion spectrum grant originally intended to promote high-definition television instead will mandate cable carriage of thousands of standard-definition broadcast channels, none of which will have competed for distribution.

Multicast must carry will not promote high quality programming.

- If operators "must carry" more than a single stream of digital broadcast programming, broadcasters will not have to compete for carriage and therefore will have no incentive to create compelling programming.



Multicast Must Carry is Bad Public Policy



The pay television marketplace is far more competitive today than when the U.S. Supreme Court handed down the must carry decision in 1997.

- The Supreme Court relied on evidence that operators had considerable and growing market power, with cable market penetration projected to grow beyond 70 percent. Current cable market penetration is below 70 percent and falling.

The inequities of multicast must carry will only grow over time.

- Improvements in compression technology over time will result in progressively more marginal broadcast channels being squeezed into a given amount of shelf space.



Multicast Must Carry Violates the First Amendment and Will Not Survive Judicial Scrutiny



Multicast must carry burdens speech without advancing important government interests.

- In narrowly upholding analog must carry, the Turner II Court recognized the important government interest in ensuring the public's access to "a multiplicity of information sources." Multicast must carry multiplies the speech of broadcasters that already have guaranteed access to viewers at the expense of independent programmers. As such, a multicasting rule will **restrict** the number of "information sources" accessible to the vast majority of Americans.

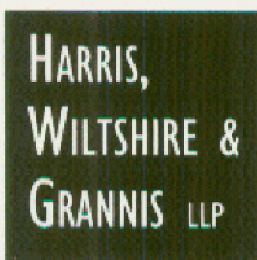


Multicast Must Carry Violates the First Amendment and Will Not Survive Judicial Scrutiny

Discovery
COMMUNICATIONS

Multicast must carry burdens speech more than necessary to advance important government interests.

- The Turner II Court also recognized the important government interest in **preserving** broadcast television and preventing the **loss of existing** viewing options. A rule requiring operators to carry a single channel of broadcast programming achieves those interests. Multicast must carry will **expand** broadcast television, thereby burdening more speech than necessary to advance those interests.



1200 EIGHTEENTH STREET, NW
WASHINGTON, DC 20036

TEL 202.730.1300 FAX 202.730.1301
WWW.HARRISWILTSHIRE.COM

ATTORNEYS AT LAW

18 November 2003

Ex Parte

Chairman Michael K. Powell
Commissioner Kathleen Q. Abernathy
Commissioner Michael J. Copps
Commissioner Kevin J. Martin
Commissioner Jonathan S. Adelstein
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

***Re: Carriage of Digital Television Broadcast Signals,
CS Docket Nos. 98-120, 00-96, and 00-2***

Dear Chairman Powell and Commissioners:

Discovery Communications, Inc. is one of the nation's premier cable programmers, producing channels that are among the best recognized, most watched and highly valued by consumers. And Discovery has already invested more than \$450 million to develop digital programming. Nevertheless, it is unable to obtain carriage for all of its channels on many cable systems. Indeed, while Discovery's flagship channel is available to more than 80 million households, seven of Discovery's channels are even today available to fewer than 35 million households.

If the Commission imposes a multicast must-carry requirement on cable companies (*i.e.*, a requirement that cable operators carry all the digital channels broadcasters can fit into their 6 MHz of spectrum), either during or after the digital transition, it will – *by government mandate* – thwart Discovery's attempts to make its programming available more widely. Indeed, it will cause Discovery programming to be dropped because broadcasting programmers will have a government-sponsored advantage in competing for the limited amount of space that cable companies can make available to the kinds of targeted channels (*e.g.*, Discovery Kids) that Discovery produces. In fact, some non-broadcasters have announced that they will develop such targeted programming and pay broadcasters for the right to use the broadcasters' anticipated multicasting must-carry rights to force their programming onto cable systems.¹ Because a multicasting must-carry requirement will burden Discovery's ability to make its programming available, and indeed will force it to reconsider further investment in digital programming, the imposition of such a requirement on cable companies will violate the First Amendment and will not survive judicial scrutiny.

¹ See *Broadcasting & Cable Magazine* (November 10, 2003) at 3.

A multicast must-carry requirement would violate the First Amendment. A multicast must-carry requirement would likely be struck down as violating the First Amendment because it would burden speech without advancing the important government interests on which the Supreme Court relied when it upheld the analog must-carry rule in *Turner Broadcasting System, Inc. v. FCC*.² As the Supreme Court said in *Turner Broadcasting*, “Congress enacted must-carry to ‘*preserve* the existing structure of the Nation’s broadcast television medium while permitting the concomitant expansion and development of cable television.’”³ But a multicast must-carry requirement would expand, not preserve, broadcast television.

In upholding the analog must-carry rule, the Supreme Court made clear it was primarily concerned about preventing the *loss* of existing viewing options: it spoke of Congress’ concern about the possible “loss of regular television broadcasting service,” whether broadcast services would “be reduced to a significant extent,” whether merely “a rump broadcasting industry” would survive, and whether there would be “a reduction in the number of media voices available.”⁴ But there is no doubt that a rule requiring cable companies to carry a single channel of broadcast programming would prevent the loss of *existing* viewing options. A multicasting requirement is simply not needed to achieve the goal that Congress had in mind in enacting the analog must-carry rule and that the Supreme Court emphasized in upholding it.

The *Turner Broadcasting* Court also recognized the important governmental interest “in ensuring public access to ‘a multiplicity of information sources.’”⁵ But a multicast must-carry rule would not advance that goal either. To the contrary, rather than provide access to a multiplicity of speakers, it would multiply the speech of broadcasters that already have guaranteed access to viewers at the expense of independent programmers like Discovery. That is, a must-carry rule that encouraged broadcasters to multicast would arguably benefit the 15 percent of households that do not subscribe to cable or DBS (down from 40 percent when *Turner Broadcasting* was decided)⁶ by giving them access to more shows from the same broadcasters – while the 85 percent of households that do subscribe to cable or DBS would have access to fewer sources of information. In short, a multicasting rule would restrict the number of “information sources” for the vast majority of Americans.

Importantly, the *Turner Broadcasting* Court acknowledged that any must-carry requirement implicates the First Amendment interests both of cable operators and of cable programmers like Discovery. The Court specifically noted that even the analog must-carry rule would “‘render it more difficult for cable programmers to compete for carriage on the limited channels

² *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997).

³ *Id.* at 193, quoting *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) (emphasis added).

⁴ *Turner Broadcasting*, 520 U.S. at 190, 192, 192, and 193 (internal quotations omitted).

⁵ *Turner Broadcasting*, 520 U.S. at 190, quoting 512 U.S. at 663.

⁶ *Turner Broadcasting*, 520 U.S. at 190.

remaining.”⁷ Justice Breyer, who provided the critical fifth vote to uphold the analog must-carry rule, recognized that analog must-carry “prevents displaced cable program providers from obtaining an audience” and thus analog must-carry “amounts to a ‘suppression of speech.’”⁸ He nevertheless concluded that, because cable systems “would likely carry fewer over-the-air stations” in the absence of analog must-carry, “the serious First Amendment price” was outweighed by the benefits of analog must-carry.⁹ Because the burden of a multicast must-carry requirement would be greater than necessary to advance Congress’s goal of preserving the existing structure of broadcast television, it is very doubtful that a multicast must-carry rule would be found constitutional.

Some have argued that a multicast must-carry requirement would be permissible because it requires a cable operator to devote 6 MHz to carriage and in this sense is no worse than analog must-carry. But this focus on spectrum simply misapprehends the required constitutional analysis. The First Amendment forbids the government from placing *any* burden on speech unless that burden “[a]dvances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests.”¹⁰ From a constitutional perspective, it simply does not matter whether the rule at issue today affects the same amount of spectrum – or even the same amount of an independent programmer’s speech – as the rule upheld by the Supreme Court in 1997. The issue is whether it imposes *any* burden on speech and, if so, whether it imposes *any greater burden than necessary* to preserve the availability of free, over-the-air broadcasting and advance the important First Amendment goal of making programming available from a wider array of sources, such as Discovery. A multicasting must-carry requirement would indeed burden Discovery’s speech by giving an enormous advantage in the market of ideas and entertainment to broadcasters, and *this* burden is not required to preserve free over-the-air television even for the 15 percent of our population that still relies on it.

A multicast must-carry requirement would be struck down on statutory grounds. In any event, a reviewing court likely would strike down an order imposing a multicast must-carry requirement without even reaching the constitutional issue. As the Commission recognized in the Report and Order accompanying the Notice of Proposed Rulemaking, in section 614(b)(3) Congress required cable operators to carry only a broadcaster’s “primary video.”¹¹ The Commission correctly concluded that “if a digital broadcaster elects to divide its digital spectrum into several separate, independent and unrelated programming streams, only one of those streams is considered primary and entitled to mandatory carriage.”¹² Especially in light of the serious constitutional issue that would be posed by construing section 614(b)(3) to require multicast

⁷ *Id.* at 214, quoting 512 U.S. at 637.

⁸ *Id.* at 226 (concurring opinion).

⁹ *Id.* at 228, 226 (concurring opinion).

¹⁰ *Id.* at 388.

¹¹ 47 U.S.C. § 534(b)(3).

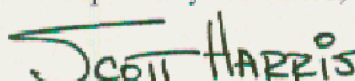
¹² *In the Matter of Carriage of Digital Television Broadcast Signals*, First Report and Order and Further Notice of Proposed Rulemaking, FCC 01-22, ¶ 57 (2001).

must-carry, it is virtually certain that a new interpretation of section 614(b)(3) construing “primary video” to mean “multiple video” would not be upheld. In *Turner Broadcasting*, the Court noted, “Congress took steps to confine the breadth and burden of the regulatory scheme.”¹³ Although the “primary video” limitation of section 614(b)(3) was not at issue in *Turner Broadcasting*, that provision clearly shows that Congress intended to limit the burden it was placing on cable programmers and operators. There is no basis to construe section 614(b)(3), contrary to the straightforward reading the Commission gave it previously, to expand the breadth and burden of the regulatory scheme.

Moreover, any attempt by this Commission to increase the burdens that the regulatory regime places on speech would obviously *not* be entitled to the “additional measure of deference” that the Supreme Court accorded Congress in *Turner Broadcasting* “out of respect for [Congress’] authority to exercise the legislative power.”¹⁴ The Court there emphasized “‘Congress is not obligated, when enacting its statutes, to make a record of the type that an administrative agency or court does to accommodate judicial review.’”¹⁵ The Commission, of course, *is* required to support its decisions by evidence in a record compiled to determine the impact of proposed rules. In short, a *regulatory* multicast must-carry requirement imposed by this Commission would – particularly in the face of the inhospitable statutory language quoted above – face far more exacting judicial scrutiny than did the *congressional* mandate at issue in *Turner Broadcasting*.

This letter is filed pursuant to section 1.1206(b)(2) of the Commission’s rules.

Respectfully submitted,


 Scott Blake Harris
 Christopher J. Wright

cc: John Rogovin

¹³ *Turner Broadcasting*, 520 U.S. at 216.

¹⁴ *Id.* at 196.

¹⁵ *Id.* at 213, *quoting* 512 U.S. at 666 (plurality opinion).